

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

DECAMP BUS LINES, INC.

and

Case 22-CA-29202

LOCAL 1317 AMALGAMATED TRANSIT UNION

*Michael D. Silverstein, Esq.*, Newark, New Jersey, for the  
General Counsel.

*Brian Caulfield, Esq. and Christine Canella, Esq.*, (Fox  
Rothschild) Roseland, New Jersey, for the Respondent.

*John A. Craner, Esq.*, (Craner, Satkin, Scheer & Schwartz  
PC) Scotch Plains, New Jersey, for the Charging Party.

**DECISION**

**Statement of Case**

Steven Fish, Administrative Law Judge: Pursuant to charges filed by Local 1317, Amalgamated Transit Union (the Union) on November 9, 2009,<sup>1</sup> the Director for Region 22 issued a Complaint and Notice of Hearing on February 24, 2010, alleging that DeCamp Bus Lines, Inc. (Respondent) violated Sections 8(a)(1) and (5) of the Act by unilaterally implementing portions of its final offer in regard to health benefits co-pays in the absence of a valid impasse, by refusing to pay unit employees' uniform allowances and by implementing a new drug and alcohol policy without affording the Union an opportunity to bargain with respect to such conduct.

The trial with respect to the issues raised by said complaint was held before me in Newark, New Jersey on August 3 and 4, 2010. Briefs have been filed by General Counsel and Respondent and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

**Findings of Fact**

**I. Jurisdiction and Labor Organization**

Respondent is a corporation with an office and place of business at 101 Greenwood Avenue, Montclair, New Jersey, where it is engaged in the operation of a commuter bus service providing interstate and intrastate transportation of passengers. During the preceding twelve months, Respondent derived gross revenues in excess of \$50,000 for the transportation of passengers from the state of New Jersey directly to points outside the state of New Jersey.

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<sup>1</sup> All dates referred to are in 2009, unless otherwise indicated.

Respondent admits, and I so find, that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Respondent's Operation

Respondent provides commuter bus services between New Jersey and Port Authority in New York, as well as a charter operation, which provides bus services to private organizations, such as schools. It employs approximately 100 employees in job classifications of bus drivers, mechanics, cleaners and maintenance employees.

Respondent is a privately owned business, which had been run by the DeCamp Family since 1870. Bob DeCamp, the current owner, is in charge of the mechanical operation. Gary Pard, Respondent's Executive Vice-President and Chief Operating Officer, is in charge of other parts of the business, such as legal, accounting and labor relations. Jonathan DeCamp is Bob DeCamp's son and is "learning the business." He is 27 years old and has been employed by Respondent for about a year. Pard is training Jonathan DeCamp to take over for Pard when Pard retires or dies.

## III. Bargaining History

Respondent has recognized the Union as the collective bargaining representative of its employees in a unit comprised of drivers and maintenance employees<sup>2</sup> since 1946.

Jorge Maldonado and Michael Murray are the President and Vice-President of the Union. Both of these individuals are also employees of Respondent. The Local Union does not represent any employees other than those who work for Respondent.

Previous negotiations were conducted by various representatives of the Union, including Murray, who has been part of the Union's negotiating team for over 13 years. Prior negotiations included a representative of the International Union, as well as at times Union counsel.

Pard has been the primary negotiator for Respondent since 2000 when he became employed by the company. Pard, in these prior negotiations, was accompanied by counsel. The attorney, who was present on behalf of Respondent for most of the recent negotiations, was Desmond Massey, Esq.

In each of the prior contracts between the parties, the expiration dates have been September 12 with new contracts of varying lengths to commence on September 13 of the year of the prior contract's expiration. During at least the 13 ½ years that Murray has been involved in bargaining on behalf of the Union, the parties have never reached agreement prior to the September 12 expiration date of each contract. Respondent did not make any changes in any terms and conditions of employment of its employees during these years, even though the prior contracts had expired.

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<sup>2</sup> While the contract mentions a unit of bus drivers and non-supervisory maintenance employees, there is no dispute that the unit recognized by Respondent also includes mechanics.

For example, the parties signed a contract on August 7, 2002, which covered a period of September 13, 2000 through September 12, 2004. The parties subsequently entered into a contract from September 13, 2004 through September 12, 2006. On January 7, 2005, the parties entered into a Memorandum of Agreement mid-contract making various changes in several areas, including uniforms.<sup>3</sup>

The 2004-2006 contract, as noted above, was due to expire on September 12, 2006. The parties did not reach agreement by the September 12 expiration date. Respondent submitted approximately three “final” offers to the Union, some before and some after the expiration date. The membership rejected all of these alleged “final” offers. Finally, a mediator was brought in to assist the negotiations, and the mediator attended a “couple” of meetings.

The Union announced a strike date, and shortly before the strike was to commence, the union bargaining committee approached Pard and informed him that a strike could be averted if the parties met and made some changes to Respondent’s last proposal. Pard agreed to such a meeting, and the parties reached agreement on the terms of a new contract. The contract was agreed upon in November 2006. The contract eventually signed, ran from September 13, 2006 through September 12, 2009.

In 2007, the parties executed three addenda to that contract, including one dated September 11, 2007 dealing with uniforms.<sup>4</sup>

Respondent in the 2006-2009 contract agreed to provide hospitalization benefits under two plans with employees agreeing to contribute 18% of the premiums + \$11.00 per week per employee. The agreement increased co-payments for doctor’s visits from \$0 to \$20 per visit, raised co-pays for generic brand drugs at pharmacies from \$10 to \$15 and for brand name drugs from \$14 to \$20. Co-pays for mail order generic and brand drugs remained that same at \$5 and \$10, respectively.

The contract also provided that “the present method of reimbursement of medical/prescription expenses to continue in accordance with existing practice.” The existing practice that Respondent utilized provided for various amounts of reimbursements by Respondent to employees to help cover portions of their co-payments for doctor’s visits and for drugs.

#### IV. The 2009 Contract Negotiations

Contrary to past negotiations, the parties decided that the 2009 negotiations be conducted without the presence of the International Union or counsel. Pard initiated discussions in March 2009, also contrary to past practice since he (Pard) had been informed by Respondent’s insurance representative that its carrier, Horizon/BlueCross BlueShield, herein Called Horizon, would be demanding substantial increases in healthcare premiums. These premiums are based on the fiscal year of Respondent so that the increases would be effective on October 1, 2009. Thus, Pard met with the union officials sometime in March, informed them that Respondent anticipated substantial increases in healthcare premiums and urged the parties to “get started earlier than we’re ever started before if we’re going to do this amongst ourselves without International intervention or counsel intervention.”

<sup>3</sup> This issue will be discussed in more detail below.

<sup>4</sup> As noted above, the details of this negotiation as well as the addendum will be set forth in a separate portion of this decision.

Pard followed up this conversation by sending the Union a memorandum, dated April 1, outlining “initial points of discussion.”

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DeCamp Bus Lines  
Memorandum

TO: JMalonado, President, ATU Local #1317

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FROM: GPPard

REF: Collective Bargaining Agreement Negotiations

DATE: April 1, 2009

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CC: ATU Local #1317 Executive Committee

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There is concern on both our parts regarding the need to re-negotiate the existing Collective Bargaining Agreement which comes to an end on September 12, 2009 at 12:00 midnight, as well as the overall global economic conditions in which we now must survive. The real positive we look at is that “we all still have jobs”, and DeCamp management is, and will continue, making every effort to maintain this position. The immediate significant negatives, at present declining rates, are the commuter ridership is estimated to be off as much as 180,000 passengers for the year and Charter revenues could be off as much as 25%; DeCamp is looking at possible revenue declines approaching in the millions of dollars.

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All of this is not to discourage or frighten anyone, but certainly make everyone aware (if they are not already) how bad our economy is in general, and the negative impact it is having on DeCamp and each one of us. It is very important that we, collectively, go into these very important negotiations with eyes wide-open so we may come out on the other side intact. The longer we allow ourselves to hold discussions without outside intervention, I believe the better we will all be.

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For initial points of discussion the Company proposes the following: 1) extend the length of the CBA from the current three (3) year time period to five (5) years so we don't always have this “sword hanging over our heads”; 2) re-structure medical co-pays; 3) eliminate the current \$11.00 weekly contribution for medical premiums and incorporate into new percentage to replace the current 18%; 4) freeze years of service calculations for pensions at September 12, 2009 only for the duration of this contract as a partial way to recover significant losses incurred during the recent “market” declines; 5) freeze certain wages that have escalated over the years beyond the value of the position; 6) increase the Defined Benefit contribution from \$1.20 to \$1.45 to begin “re-funding” the Plan; and 7) discussions regarding wage increases in years four (4) and five (5).

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Please take all the time you need to absorb, think about, and discuss ALL the above, and let me know when you believe you are ready to begin discussions. Also, just a reminder/suggestion, we cannot expect the “government” to bail us out, we must do this ourselves, and we can, possibly showing the rest of the USA how its [sic] done!

The parties commenced bargaining on May 5. Present for the Union, in addition to Maldonado and Murray, were Charlie Canta, Financial Secretary, and Stop Stewards Chico Gallindo and James Sproule. Pard and Jonathan DeCamp were present on behalf of Respondent. Pard informed the Union that Respondent had been told by its insurance agent of substantial increases in premiums for medical coverage and that this would result in major givebacks by employees in order to cover these additional costs. Pard also told the Union that Respondent had been informed that the increases could potentially result in an increase of \$450,000 to \$500,000 in premium increases.

Pard suggested, and the Union agreed, to table substantive discussions about healthcare until Respondent received actual numbers from its carrier and that the parties concentrate on other parts of the contract until these numbers are received.

The parties met weekly during May and discussed issues other than healthcare since Respondent did not yet have the actual number from Horizon.

The parties met once again on June 3. At this meeting, the Union presented to Respondent a written proposal as follows:

JUNE 2, 2009

Decamp Bus Co.  
101 Greenwood ave. [sic]  
Montclair, N.J. 07042

Att: Mr. Gary Pard

In light of the current economic conditions in our country and specifically the transportation industry, we ourselves are suffering the same financial situation as the rest of the nation. We are not immune to the stranglehold called "recession" that's choking our economy, and others', like a noose worldwide.

That being said, these are our needs to be considered in addressing the formulation of the new Collective Bargaining Agreement.

#### Pay Rate Increases

1. pay increase of 3% the first year
2. 4% for years 2 and 3
3. 5% for years 4 and 5, if indeed this will be a 5 year C.B.A.

#### Medical CO-pays

1. Doctors visits are to remain the same for the duration of the C.B.A.

#### Prescription CO-pays

1. Are to remain the same until you receive a response from Horizon BC/BS at which time we will discuss the best course of action in the best interest of our members.

#### Define Benefits

1. The plan should be increased from \$36.00 to \$55.00 for each year of

service commencing as of September 1997.

#### Define Contribution

1. Increases to the define contribution pension plan as follows:

- a. \$.35 for the 1<sup>st</sup> year
- b. \$.40 for 2<sup>nd</sup> and 3<sup>rd</sup> years
- c. \$.50 for 4<sup>th</sup> and 5<sup>th</sup> years

#### Charters

Charter rate should be increased \$16.50 per hour.

Charters having 6 hours or less should be a flat \$100.00 plus an additional \$4.00 cell phone use.

Multiple day charters will have a guarantee of 12 hours for first and last day and 15 hours in between days. Meal money should be increased to \$35.00 per day. (\$8.00 for breakfast, \$10.00 for lunch, and \$17.00 for dinner). \$12.00 every other day on charters lasting 3 days or more for sweeping of motorcoach.

Charter show-up to revert to full time employees on a "First in/First out" basis. No handing down or passing down of charter work.

#### Berievement [sic]

Any berievement [sic], should be 3 days pay regardless of any day of the week incurred.

#### Sick Days

We need 1 paid personal day and 2 paid sick days per pick.

#### Incentive Pay

Mechanics and garage personnel to receive 1 ½ days incentive pay due to their 6 month pick period.

#### Holidays

January 15<sup>th</sup> (Martin Luther King, Jr.) should be incorporated as an additional paid holiday.

After some discussion of these proposals, Pard repeated his prior statements to the Union that there would be significant increases in Respondent's healthcare premiums and that Respondent would need some concession on healthcare costs from the Union and the employees. Pard stated in this regard that Respondent would no longer be able to reimburse employees for their co-payments for doctor's visits or certain drug payments as it has done in the past.

Pard then made proposals concerning co-pays, which in part reflected his previous assertion that reimbursements by Respondent for co-pays would cease. He began the presentation by actually proposing a reduction in co-pays for the use of generic drugs at pharmacies from the current \$15 to \$10. He explained to the Union that Respondent was proposing this reduction in the co-pay in order to encourage employees to use generic drugs

and to lower costs both for themselves as well as for Respondent.

Pard proposed a raise in employees' co-pays for brand name drugs at pharmacies from \$20 to \$30. What this meant was previously employees had a \$40 co-pay for these drugs and Respondent would reimburse them \$20 of the amount. Thus, in effect, he was proposing an out-of-pocket increase of \$10 for employees for these drugs.

With respect to doctor's visits, employees previously had a co-pay of \$30 and Respondent would reimburse them \$10 of that amount. Pard proposed eliminating that \$10 reimbursement so that employees would be paying the entire \$30 co-pay for doctor's visits.

Respondent had not been reimbursing employees for their mail order co-pays for either generic or brand name drugs. Respondent, by Pard, proposed raising the co-pays from \$5 to \$10 for generic and from \$10 to \$25 for brand name.

Although there was general discussion about these proposals, no union official made any comment about them. Pard testified that since no one from the Union disagreed with or disputed his proposals and that he felt that the Union had agreed to these changes. However, Pard concedes that no one from the Union expressed agreement to any of these changes, including Pard's assertion that reimbursements for co-pays would no longer be provided by Respondent. Pard also brought up the issue of employee contributions toward the premiums. As related above, employees were contributing 18% of the premiums plus \$11, which according to Pard, represents a little less than 22%. Pard informed the Union that employees would have to increase their contributions since the average contribution in the state of New Jersey is between 28% to 32%. Pard mentioned numbers like 24% or 26%, but did not make a specific proposal since he had still not received the actual numbers on the amount of the increases that would be requested by the carrier.

The parties continued to meet regularly in June and July. Both the Union and Respondent submitted written proposals, which were discussed during these meetings. Neither of these written proposals mentioned healthcare since the parties were still awaiting the actual numbers from Horizon. The parties reached agreements on several issues, such as changes in bereavement pay and holidays, but several significant issues were still in dispute aside from healthcare, such as the length of the contract and Respondent's proposals to cap wages for certain classifications and a two-tier wage scale for bus operators.

At the July 1 meeting, Respondent proposed the addition of a third tier of co-pays for expensive, high-end non-preferred drugs.

At some point in July, Respondent received preliminary numbers from Horizon and as expected substantial increases were requested. Pard did not share these numbers with the Union at the time. Instead, Pard instructed his insurance agent to attempt to negotiate with Horizon to try to lower the rates requested. The agent agreed to do so.

At the August 5 meeting, Pard mentioned to the Union that Horizon was requesting a \$450,000 annual increase in premiums, but that negotiations with Horizon were still in progress. Pard added that Horizon was attempting to force DeCamp out of what everyone refers to as its current "Cadillac Plan." Thus, Horizon was telling Respondent to either accept a half a million dollar increase "or let's negotiate acceptable options in the plan that you guys can live with."

Subsequent to this meeting, Respondent's agent continued to negotiate with Horizon. On August 19, Respondent met with its agent, who presented Pard with a written analysis of the

proposals that he had negotiated with Horizon.

Based on these figures, Respondent prepared a new proposal to present to the Union at a meeting on August 20. Respondent's proposal contained terms for both a three-year and a five-year agreement. As noted above, the term of the agreement was still in issue. Respondent was seeking a five-year agreement and the Union for three. Thus, Respondent's proposal included Respondent's terms for either three or five years for each item in the proposal. For example, with respect to wages, Respondent's proposal for a three-year contract included a \$500 one-time payment for operators on 9/13/09, a \$250 payment on 9/13/10 and raises of \$.25 per hour on 9/13/11 and \$.40 per hour on 9/13/12. In its five-year proposal, Respondent offered the same \$500 one-time payment on 9/13/09 and 9/13/10, but added a defined contribution of \$250 per employee on these dates. On 9/13/11, 9/13/12 and 9/13/13, Respondent offered payments of \$250 defined contributions, plus raises of \$.25, \$.30 and \$.35 per hour, respectively for these three years.

With respect to charter rates of pay, Respondent offered increases in rates from \$13.25 to \$14.50 on 9/13/09 for full-time operators and no raise for part-time operators, and no raises in subsequent years in its three-year proposal.

In its five-year proposal, Respondent offered raises to \$14.50, \$15.00 and \$15.75 to full-time operators on 9/13/09, 9/13/10 and 9/13/11 – 9/12/14, respectively, and raises for part-time operators from \$13.25 to \$13.75 on 4/13/10 and to \$14.25 on 9/13/13.

This offer also contained specific changes in healthcare costs for both the three and five-year proposals that requested employee contributions to be raised to 24% between 9/13/09 and 9/12/11 and then to 26% from 9/13/11 to 9/12/12. Its five-year proposal requested increases to 24% from 9/13/09 to 9/12/12 and then to 26% from 9/13/12 to 9/12/14. With respect to physician and prescription co-pays, Respondent's proposals were identical for both the three and five-year plans. They provided for physician co-pays of \$30 and for 30-day supply at pharmacies, the co-pays were \$20 for generics, \$40 for preferred brands and \$60 for non-preferred brands,<sup>5</sup> and for a 90-day supply of drugs by mail order, Respondent proposed co-pays of \$40, \$80 and \$120, respectively for the same three categories of drugs referred to above. Respondent's proposal included increases in employee contribution percentages for medical and vision coverage as well as increases in ambulatory care and emergency room co-pays.

The parties went over "line by line" Respondent's proposals. When the parties discussed Respondent's healthcare proposals, one of the union officials asked, "No more reimbursements?," referring to Respondent's elimination of the prior practice of reimbursing employees for physician and drug co-pays. Pard responded, "No more reimbursements, guys." The union representatives made no response to this statement nor to any of Respondent's proposals at that meeting.

Pard commented at the meeting about Respondent's healthcare proposals. He reiterated what they had said in previous meetings. That is that health insurance costs are skyrocketing and the employees need to bite the bullet a little bit more. The membership needed to help because Respondent wasn't going to "eat this" alone.

Maldonado did mention at that meeting that maybe the parties could do "a little better"

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<sup>5</sup> As related above, Pard first raised this issue at the July 1 meeting. Respondent's prior plan did not have a third tier for non-preferred drugs.



on some of these numbers, but made no counter-proposals. The union officials stated that they needed time to digest the numbers and to discuss them with the membership.

On September 8, the Union held a membership meeting, in which Respondent's proposals were discussed. Also, present at this meeting was International Representative Larry Hanley. The union representatives presented the proposals made by Respondent to the membership for discussion. The members were highly upset with Respondent's proposals for a five-year contract, the two-tier operator proposals, the capping of classifications and the increase in out-of-pocket medical costs to employees. The membership told the committee to go back to the company and inform them that Respondent has to "do better than this."

The membership also discussed Respondent's proposal to eliminate a bargaining unit stock clerk position. Pard had stated that Respondent did not consider it to be a full-time position and wanted non-unit employees to perform the job function previously performed by that individual.<sup>6</sup> Hanley made a suggestion that the Union propose to Respondent that another unit employee perform the work and earn extra wages for performing the extra work. The membership agreed that this proposal should be made to Respondent.

Consequently, on or about September 10, the union committee met with Pard. They made the proposal to Pard concerning the stock clerk position. Pard agreed to the concept and after some discussion about the amount of money to be paid to the unit employee, who would perform the extra work, the parties agreed on \$3.00 per hour.<sup>7</sup>

Murray then told Pard that the contract was expiring in a couple of days, and the employees wanted everything to remain status quo as in the past and that the parties would still be working under the terms of the old contract. Pard replied yes, it has always been that way and it will be status quo even though the contract may expire. Murray asked if the Union could get that assurance in writing. Pard replied that the Union didn't need anything in writing, "You have my word, it's always been like that here and it's going to be status quo."

The parties met again on September 18. Pard began this meeting by presenting the union officials with a document, entitled "DeCamp Bus Lines Collective Bargaining Negotiations." This document reflected Pard's summary of negotiations in the four main areas of contention. They were, according to Pard, wages, institution of a two-tier system for drivers, capped wages for various positions and medical insurance increases. The document also reflected Respondent's rationale for its proposals in these areas. The parties discussed these issues and Respondent's contentions.

Pard then submitted to the Union another document, entitled "Employer Offer." This document proposed only a five-year contract as opposed to the document submitted on August 20, which, as noted, had Respondent's offers for both a three and five-year contract. The proposal submitted on September 18 was similar in most respects to Respondent's August 20 offer, but also contained some differences. The September 18 offer reflected the parties' agreement reached on September 10 with respect to the duties of the former stock clerk position being performed on a part-time basis by a bargaining unit employee to be paid an extra \$3.00 per hour to perform this work. While the August 20 5-year offer provided for employee contributions on healthcare to be increased 24% for the first three years and to 26% for the last two, the September 18 offer provided a 26% increase for all five years of the contract. The

<sup>6</sup> That individual was about to retire in late 2009.

<sup>7</sup> The Union initially proposed \$5.00 per hour to Pard's counteroffer of \$3.00 per hour.

September 18 offer did not include Martin Luther King Day as an additional holiday although that had been previously agreed to and was included in the August 20 offer. On the other hand, the September 18 offer included greater one-time increases in operators' pay than the August 20 offer. The September 18 offer included raises for all full and part-time charter operators upon approval of the agreement and on 9/13/12 rather than separate rates for full and part-time charter operators that were offered in its August 20 offer.

The parties continued to bargain on September 18 as well as at other sessions in late September. During these meetings, the parties reached a number of tentative agreements on various subjects, including some agreements on healthcare issues.

For example, Respondent's September 18 offer called for employee healthcare contributions of 26%. The Union initially proposed that contributions remain at the current rate of 22%. When that offer was rejected by Respondent, the Union made a counteroffer of 23%, which was again rejected by Respondent. Respondent subsequently accepted the Union's next proposal of 24%.

Similarly, Respondent's September 18 proposal of a \$40 co-pay for preferred brands at pharmacies was reduced to \$30 as a result of bargaining with the Union. With respect to mail order preferred drugs, Respondent's September 18 proposal was \$80. Initially, the Union proposed retaining the status quo of \$30. When that was rejected by Respondent, the Union incrementally raised its offer from \$30 to \$60, which was agreed upon by Respondent.

The Union also made counterproposals to Respondent's demands for generic co-pays and for co-pays on the new category of non-preferred brands, but Respondent rejected all of these counterproposals and stuck with its co-pay proposals of \$20 and \$90 for generic (pharmacy and mail order, respectively) and \$60 and \$120 (pharmacy and mail order, respectively).

Similarly, when Respondent continued to insist that there would be no reimbursements for co-pays as in the past, the Union initially took the position that reimbursements should remain as in the past. The Union then came back with a proposal to reduce the reimbursements to \$5 or \$10. Respondent, however, rejected these counterproposals and continued to assert that there would be no more reimbursements.

Additionally, Respondent's September 18 proposal of a 26% employee contribution for vision coverage was reduced through bargaining to 24%.

Further, the parties also reached tentative agreements on various other subjects through bargaining during this period. Thus, Respondent's September 18 offer of defined pension payments of \$36, \$37 and \$38 on various dates between January 1, 2011 and January 1, 2012 was increased through bargaining to \$37, \$38 and \$40, respectively. Similarly, Respondent agreed to restore its prior agreement on an additional holiday of Martin Luther King Day during these meetings. Also, the parties' bargaining resulted in increases in the hourly wages for operators and charter operators.<sup>8</sup>

<sup>8</sup> Respondent had offered one-time payments of varying amounts to its operators in its September 18 offer. That was changed through bargaining to raises of \$.15 per hour in each of the first two years of the contract and \$.35 per hour for the next three years. Respondent's September 18 offer called for identical raises to both full and part-time character operators of \$14.00 on approval of the contract and to \$14.50 on 9/13/12. Through bargaining, Respondent

Continued

Towards the conclusion of the parties' September 23 meeting, Pard inquired as to when the union membership would vote on Respondent's proposal. Murray responded that in order for the membership to vote on a proposal of Respondent, the Union requires a final offer. Pard responded okay, "You'll have a final offer." The Union received a written final offer later on the same day after the bargaining session. The document, entitled "Negotiated Final Offer," reads as follows:<sup>9</sup>

DeCamp Bus Lines  
DeCamp Bus Lines/ATU Local #1317 Executive Committee  
Negotiated Final Offer  
Collective Bargaining Agreement –  
September 13, 2009 through September 12, 2014

3.4	Insurance for Employees:	
(g)	Employee Contribution:	24%
	Physician Co-Pay	\$30.00
(h)	Prescription Co-Pays:	
	Pharmacy: (30 day supply)	
	Generic	\$20.00
	Preferred Brand	\$30.00
	Non-Preferred Brand	\$60.00
	Mail-Order: (90 day supply)	
	Generic	\$40.00
	Preferred Brand	\$60.00
	Non-Preferred Brand	\$120.00
(k)	Vision Coverage – Employee Contribution	24%

Effective October 1, 2009 the Employer had purchased a "wellness program" – consists of two (2) parts: #1) general physical and blood work; #2) review of results from #1 with medical professional; the Employer will pay \$25.00 to each Employee who takes advantage of this program after Step #2 has been confirmed (both steps to be conducted on site).

Effective October 1, 2009 the Employer has purchased entrance into a "National Network" affording Employees to work with physicians and hospitals outside of the New Jersey network.

changed its offer to raises of \$14.50, \$15.00 and \$15.25 per hour for full-time charter operators on approval of the contract, 9/13/10 and 9/13/11, respectively. For part-time charter operators, Respondent revised its offer through bargaining to \$13.75 and \$14.25 per hour on 9/13/10 and 9/13/13, respectively.

<sup>9</sup> While Pard testified that he handed the "final offer" to the Union at their final bargaining session, I credit the mutually corroborative testimony of Murray and Maldonado that it was received by the Union after the meeting in a manila envelope at the dispatch office. Further, this "discrepancy" in the testimony of the witnesses is inconsequential to the resolution of any of the issues herein.

Co-Insurance:	In-Network	80/20
	Out-of-Network	60/40

(co-insurance will be reimbursable by the Employer to the equal of 90/10 and 70/30 respectively)

5	ER Co-Pay	\$100.00
	Ambulatory Care	90% after \$50.00 co-pay (2009-2012)
10		90% after \$100.00 co-pay (2013-2014)
	Hospital Confinement	\$500.00 co-pay
	Out-of-Network	150% of CMS
15	Out-of-Network Deductible	\$1,000.00 single/ \$2,000.00 family

### 3.5(a) Pensions for Employees:

At September 13, 2009 the Employer will increase the contribution to the Defined Benefit Plan to \$1.45

Defined Benefit Plan monthly payouts to be adjusted as follows:

25	01/01/2007 – 12/31/2010 (status quo)	\$36.00
	01/01/2011 – 12/31/2011	\$37.00
	01/01/2012 – 12/31/2013	\$38.00
	01/01/2014 -	\$40.00

### 3.9 Funeral Leave:

(additional language to read after "without loss of pay") "but not to include holidays and/or while on vacation".

- 35 (a) Day before/dayof/day after  
(b) Same as above  
(c)(3) Same as above

### 3.10 Holidays:

- |    |  |
|----|--|
| 40 | (a) Addition of "Martin Luther King Day"<br>(b) Substitution of "Columbus Day" for the day following<br>"Thanksgiving Day" |
|----|--|

## 5.2 Arbitration:

Substitute existing language to read, “and shall request, from an accredited Board of Mediation (upon mutual agreement) to designate” etc.

7.1 Effective Date and Duration of Agreement:

50 09/13/2009 – 09/12/2014

## 8.7 Uniforms

Increase total sum from \$275.00 to \$325.00 with stipulation that there is a maximum of \$75.00 that can be used, in any year of the CBA, for an acceptable driver dress shoe purchased through a supplier of the Employees choosing and reimbursable by the Employer upon presentation of an appropriate receipt.

## 8.10 Operators' Wage Rates:

## (a) Increases effective:

Upon Collective Bargaining Agreement Approval	\$.15 per hour
09/13/2010	\$.15 per hour
09/13/2011	\$.35 per hour
09/13/2012	\$.35 per hour
09/13/2013	\$.35 per hour

(b) Effective upon Collective Bargaining Agreement approval, and following, the Employer will institute a "second wage tier for drivers" at 80% of the current payroll rate (09/12/2009 - \$20.68), establishing \$16.50 as that level's top rate beginning 09/13/2009, then subject to the appropriate hourly contractual wage increases noted in the Collective Bargaining Agreement.

## 10.2 Charter Rate(s) of Pay:

## Full-Time Operators:

Upon CBA approval	\$14.50 per hour
09/13/2010	\$15.00 per hour
09/13/2011	\$15.75 per hour

## Part-Time Operators:

09/13/2010	\$13.75 per hour
09/13/2013	\$14.25 per hour

## 10.2(e)(2) Meals/Lodging:

Operators on multiple-day trips shall be provided satisfactory hotel/motel room accommodations and shall receive a daily meal allowance, consisting of a flat rate of thirty-one (\$31.00) dollars for each full day away from "home".

## 10.2(i) Cleaning:

The Operator will be paid a flat fee of eleven (\$11.00) dollars every other day for cleaning/dumping buses while on tour.

## 11.1(d) Attendance Bonus:

Because the Garage only has two (2) picks per year, it was determined, in order to be equivalent to the driver bonus program, that the language would be changed to read "equal to one and one-half days pay" (1 ½).

## 11.6(c) Tool Allowance:

Increased to \$350.00 annually

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## 11.6(e) Shoe Allowance:

For the duration of the CBA - \$300.00

## 11.7(a) Maintenance Rates of Pay:

10		<u>Mechanic</u>	<u>Repairman</u>	<u>Inspector</u>
	Upon CBA approval	\$0.25 \$0.20		\$0.15
	– per hour			
	Defined Contribution	\$0.05	\$0.05	--
15	09/13/2010 - per hour	\$0.25	\$0.20	\$0.15
	Defined Contribution	\$0.05	\$0.05	--
	09/13/2011 – per hour	\$0.25	\$0.20	\$0.15
	Defined Contribution	\$0.05	\$0.05	--
20	09/13/2012 – per hour	\$0.35	\$0.25	\$0.00
	Defined Contribution	\$0.05	\$0.05	--
	09/13/2013 – per hour	\$0.35	\$0.25	\$0.00
	Defined Contribution	\$0.05	\$0.05	\$ --

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Note #1: due to retirement the Stock Clerk position will remain unfilled at the Employers discretion until which time it is deemed necessary, due to workload, to re-fill the position with a full-time employee. During this period of time (undefined), a garage person (based on seniority) will assist management personnel in maintaining the stockroom at a rate of \$3.00 per hour (additional to their regular wage rate) based on a forty (40) hour work week.

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Note #2: the Inspector and Stock Clerk (in the future) positions will, effective immediately, have a “capped” wage rate of \$19.75 per hour, and both positions will be subject to “progression” beginning at 80% with 2.5% incremental increases in their rate every six (6) months up until thirty (30) months, at which time they will be at 100% of their capped wage.

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Note #3: capped wage rate positions will receive appropriate hourly increases scheduled by the Collective Bargaining Agreement up to the “capped wage rate”, but not less than the effect of \$500.00 annually; any difference to be made-up in a one-time payment at the beginning of a Contract year in which the individual exceeds the “capped” wage rate. Personnel having reached the “capped wage rate” in the previous Contract year will receive annual one-time payments of \$500.00 at the beginning of succeeding Contract years.

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## 11.7(b) Cleaner Rates of Pay:

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Upon CBA approval	\$0.30 per hour
09/13/2010	\$0.30 per hour
09/13/2011 – one-time payment \$250.00	
09/13/2012	\$0.25 per hour
09/13/2013	\$0.25 per hour

Note #1: see “capped wage rate” explanations in the Maintenance section; Cleaners are now “capped” at \$13.75 per hour; General Maintenance is “capped” at \$14.25 per hour; and the Detailer position is “capped” at \$15.00 per hour.

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On or about September 25, the union bargaining committee approached Pard in his office. The union representatives informed Pard that Respondent’s final offer would be a “hard sell” for the membership and asked Pard to make some adjustments in order to show “movement.” Pard replied, “We both want a contract. Let’s see what we can do to get one.” The Union proposed several adjustments in the prescription co-pays. They were reducing the preferred brand pharmacy co-pays from \$30 to \$25, the non-preferred brand pharmacy co-pays from \$60 to \$30, the mail order generic from \$40 to \$30, the mail order preferred brand from \$60 to \$40 and the mail order non-preferred brand from \$120 to \$60. Pard agreed to all of these adjustments proposed by the Union. While the union officials did not tell Pard that they were going to recommend that employees accept the offer, Pard believed that they would do so since all of the items had been negotiated and Respondent had agreed to all the last minute adjustments the Union had requested.<sup>10</sup>

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#### **V. The Employees’ Reject Respondent’s Final Offer**

On October 9, the union membership voted to reject Respondent’s final offer by a substantial margin.<sup>11</sup>

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Pard, as related above, was informed about the results of the vote by his dispatcher on the same day of the vote. The dispatcher also informed Pard that union committee members had made some disparaging remarks about Pard personally during the membership meeting.

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On October 14, the committee met with Pard and Jonathan DeCamp. Maldonado informed Pard that the membership had turned down Respondent’s final offer. Murray added that the main sticking points were the five-year contract and the medical plan, and if the parties continued to bargain, they could probably tweak it a little better and get a contract approved.

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Pard replied that he already knew what the vote was and that he understood that the committee did not sell the contract to the membership. Pard added that the committee had told the members not to vote for the offer and “that’s bargaining in bad faith as far as I’m concerned.”

Murray again suggested that if the parties could sit down, maybe they could do a little

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<sup>10</sup> I credit the testimony of Pard, as detailed above, concerning the adjustments made by Respondent after the Union received its final offer. While Maldonado on rebuttal testified that “he didn’t recall” going back to Pard and asking for additional adjustments, Maldonado continued to state that “he didn’t recall” such discussions, but did not unequivocally deny that they took place. I find this equivocal and uncertain testimony to be unpersuasive, particularly since Murray was not called as a witness to corroborate Maldonado’s purported denial. I found Pard’s testimony to be credible and unequivocal and to be supported by a document, which contained written figures corresponding to the adjustments that the testified that he made to Respondent’s prior final offer.

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<sup>11</sup> According to Maldonado and Murray, the vote was 68-9. According to Pard, he was informed by his dispatcher that the vote to reject the contract was 73-15. I find this discrepancy to be inconsequential and find that the contract was rejected by a substantial margin.

tweaking. Pard responded angrily that “you guys” (referring to the committee) don’t know anything, five and a half months have gone by and let’s bring in the International and the lawyers. Pard added that he would see them in January and “Don’t forget you can’t burn garbage cans in Montclair in January.”<sup>12</sup>

Neither Pard nor any of the union committee members mentioned anything during this brief meeting about an “impasse.”<sup>13</sup>

## VI. Respondent Implements Portions of Its Final Offer

On October 15, Respondent sent a memorandum to each of its employees and to the Union announcing its decision to implement a new health plan known as BlueCare PPO Decision (5), a copy of which was attached. The memorandum reads as follows:

### DeCamp Bus Lines Memorandum

TO: ATU Local #1317 Membership  
FROM: GPPard  
REF: Medical Insurance (“Implementation”)  
DATE: October 15, 2009  
CC: JMaldonado/CBA File

This memorandum and action will not, and does not, sit well with anyone. However, in lieu of an approved new Collective Bargaining Agreement, the Company, due to economic constraints (which were discussed in detail with your Executive Committee) is, effective October 15, 2009, “implementing the latest, and revised, version of the DeCamp Bus Lines offered Horizon BlueCrossBlueShield of New Jersey insurance plan known as BLUECARD PPO DESIGN 5 (see attached).

The Company fully understands that Membership did not approve the “Final Offer” submitted to the Membership for vote of approval of which medical insurance was but just one issue. However, even though Horizon came in with a \$450,000.00 increase, and the Company was able to negotiate this downward to \$250,000.00 (with changes primarily to Out-of-Network), it is still too much for the Company

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<sup>12</sup> The Union had not taken a strike vote at that time nor did it inform Respondent about a possible strike. Maldonado interpreted Pard’s remarks to be that if the Union strikes it would be in January and be cold, and that the Union could not burn garbage cans during any strike because of the town ordinance.

<sup>13</sup> My findings concerning the October 14 meeting are based on a compilation of the credited portions of the testimony of Maldonado, Murray and Pard. For the most part, there is little dispute about what was said by the participants. However, on direct testimony, Pard testified that he informed the committee during this meeting that Respondent intended to implement its medical plan. I do not credit this testimony since it is inconsistent with the credible testimony of Murray and Maldonado as well as Pard’s own testimony when examined by the undersigned.



to absorb alone, and therefore, are asking you to share in the form of a revised plan that distributes more of the medical costs to you. At this time the Company is only “implementing” the insurance plan and has not made any changes to your personal contribution rate toward the cost of insurance (obviously this to be negotiated with a new CBA).

This will affect us all unfortunately, but right now there is no easy solution, ASK CONGRESS! Please note, in particular, the pharmaceutical posting in the drivers’ room and shop area to see the differences between Generic, Brand and Non-Preferred Brand drugs, the cost differentials are significant. As this program is now in effect, Horizon may contact you directly if you are using a Non-Preferred Brand and suggest the appropriate Generic substitute; please check with your Physician and/or Pharmacist to be sure.

Thank you for your understanding.

Pard furnished some testimony concerning his reasons for implementing the plan. He testified essentially that since the union committee had made disparaging remarks about him and because the Union did not sell the final offer to the membership, he felt that Respondent “can’t absorb these medical costs. I’m going to implement the plan and take my chances.”

Significantly, Pard did not testify that he felt that the parties were at impasse or that no further bargaining would be fruitful. Indeed, Pard admitted that he contemplated further bargaining with the Union about various issues, including the reimbursement rate to be paid by employees.

The plan implemented by Respondent included implementing its decision to cease making any reimbursements for co-pays. The plan implemented by Respondent included co-pays of \$20, \$40 and \$60 for pharmacy co-pays and \$40, \$80 and \$120 for mail orders for generic, preferred and non-preferred drugs, respectively.<sup>14</sup>

After receiving Respondent’s memorandum, Maldonado notified Hanley and Union Counsel John Craner of Respondent’s actions. Craner sent a letter to Respondent’s attorney with copies to Pard and Maldonado as follows:

October 20, 2009

Desmond Massey, Esq.  
Fox Rothschild, LLP  
75 Livingston Parkway  
Roseland, New Jersey 07068

Re: Collective Bargaining Negotiations Between  
ATU Local 1317 and DeCamp Bus Lines, Inc.

Dear Desmond:

My purpose in writing to you is because your client has issued a notice to all the employee-members of Local 1317 dated October 15,

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<sup>14</sup> I note that in Respondent’s final offer, after the adjustments made by Respondent, the pharmacy co-pays were \$20, \$25 and \$30 and for mail order, the co-pays offered were \$20, \$40 and \$60.

2009 advising them that it is “implementing the latest, and revised, version of the DeCamp Bus Lines offered Horizon Blue Cross Blue Shield of New Jersey insurance plan known as BlueCard PPO Design 5”.

5                   Please be advised that in unilaterally implementing this program and thereby changes the terms of the expired collective bargaining agreement, your client is committing an unfair labor practice.

10                   While I appreciate the fact that your client contends in its letter to the employees that the cost of the existing program is too much for the company to absurd [sic] alone, nevertheless it has no right to change the existing program or the costs paid by the employees. While I note that the company letter states that the company is only “implementing” the insurance plan and has not made an [sic] changes to the personal contribution rate which it recognizes is to be negotiated by the new collective bargaining agreement, nevertheless changing the plan alone violates the existing collective bargaining agreement and is therefore an unfair labor practice.

15                   Therefore, on behalf of the Union I am requesting the company to reinstate the existing plan and if it does not, the Union will then contemplate filing an unfair labor practice charge against the company for refusal to bargain in good faith.

20                   Very truly yours,  
John A. Craner

25                   On the day before election day in November 2009, Hanley spoke to Massey and asked about resuming negotiations with Respondent, and informed Massey that he (Hanley) would be involved in future negotiations. Massey told Hanley that he would contact Respondent to see if he (Massey) would be involved in negotiations, and if so, if Respondent was willing to continue negotiations. Later in November, after Massey confirmed with Pard that Respondent was willing to meet and that Massey would be involved in negotiations, he so informed Hanley.

30                   As a result of scheduling problems of all parties, an acceptable date to resume negotiations took several months to be agreed upon. The parties met in February 2010, and negotiations were still in progress as of the date of the instant hearing.

## **VII. The Uniform Allowance**

40                   Article 8.7 (Uniforms) has been a staple of the parties’ collective bargaining agreements for at least the past ten years. This clause has always had four sections – Section (a) requires that uniforms, as specified by Respondent, shall be worn during all work hours and shall be furnished by all drivers. The section also indicates that Respondent shall have the right to require employees to purchase uniforms at one supplier when Respondent selects one; Section (b) indicates that operators who are not in regulation attire during their working hours will be held off work without pay; Section (c) is the amount of the annual sum Respondent will pay operators, in the form of an allowance, for the purchase of appropriate uniform items and incidentals; and Section (d) states that one color trousers shall be worn by all drivers.

45                   The 2006-2009 contract’s original uniform policy contained a \$275 driver allowance in Article 8.7(c), divided into a \$225 allowance for uniforms (renewable on September 13 every year) and a \$50 cash payment for incidentals payable on or about November 1 of each year of

the agreement. In September 2007, the Union and Respondent negotiated an addendum to Article 8.7. This addendum confirmed Respondent's right under the contract to select an exclusive uniform supplier, and in exchange for selecting one supplier for all uniform needs, Respondent agreed to increase the uniform allowance to \$325 (\$275 for clothing and \$50 for incidentals).

The addendum reads as follows:

DeCamp Bus Lines  
Memorandum

TO: Executive Committee of ATU Local #1317

FROM: GPPard

REF: Addendum to current Collective Bargaining Agreement

DATE: September 11, 2007

CC: CBA File

Today, the Executive Committee of ATU Local #1317 and the Employer did meet to agree on the right of the Employer to exercise its' "right" under Section 8.7 Uniforms, "to require employees (specifically fulltime drivers) to purchase uniforms at one supplier selected by the Employer". In addition to this agreement on a supplier, the Employer did further agree to increase the specific clothing allowance to \$325.00 (\$275.00 for specified clothing and \$50.00 for incidentals) from the currently agreed total amount of \$275.00; this new amount will become effective for the period from October 15, 2007 through the end of this current Collective Bargaining Agreement at September 12, 2009.

The specifics of the clothing acceptable is determined in general by the Collective Bargaining Agreement (ie; para. 8.7.; pg.#16) language, while more exacting detailed distinctions will be determined jointly based on availability by the Executive Committee of ATU Local #1317, the Employer, and the approved Vendor.

This addendum can be incorporated into future Collective Bargaining Agreements, but only through future negotiations and based on this current two year period performance.

The prior contracts did not contain the language set forth in the last sentence concerning the incorporation of the addendum into future agreements. In 2007, the Union brought to Pard's attention that Respondent had not in the past exercised its contractual right to purchase uniforms at one supplier, and Pard proposed that if the Union agrees that Respondent can exercise that right, then Respondent would throw in another \$50 in reimbursement from \$275 to \$325 (\$275 clothing and \$50 for incidentals – cleaning). The Union agreed to this change, but also agreed to Pard's proposal to include the last sentence dealing with future contracts.

The prior practice had been since 2007 that employees would go to Interpole, the uniform company selected by Respondent, and obtain their uniforms in September of each year, and Interpole would bill Respondent directly. The \$50 allowance for uniform cleaning would normally be paid to employees in November.

On and after September 13, when the contract expired, employees were informed by a human resources representative that they could no longer go to pick-up their uniforms. When the employees asked the Union about this issue, Murray and Maldonado spoke to Pard about it in the presence of DeCamp. Murray asked why drivers were being told not to go down to pick-up their uniforms. Pard replied that since there was no contract that Respondent would no longer be providing uniform payments. Maldonado reminded Pard that he had told union officials that everything is “status quo”<sup>15</sup> as in previous years when everybody always received their uniform allowances. Pard repeated that there is no uniform allowance now. Jonathan DeCamp interjected, “Sign a contract and you’ll have your uniform allowance.”<sup>16</sup>

It is undisputed that in November the employees did not receive the \$50 from Respondent for incidentals (cleaning) as they did in prior years.

### VIII. The Drug and Alcohol Policy

Respondent is required by federal regulations to maintain a controlled substance and alcohol use and testing policy that is compliant with federal law. The regulations are enforced by New Jersey Transit, which is the conduit for the federal government with respect to enforcing these regulations.

Respondent has been compliant with these requirements and pursuant thereto has had in existence a policy, entitled “DeCamp Bus Lines Zero Tolerance Drug and Alcohol Policy for Safety Sensitive Employees in Transit,” for many years.

On July, 1, 2009, Respondent received a letter from Cosi, a contractor hired by New Jersey Transit, informing Respondent that it would be auditing Respondent to see if it is in compliance with federal regulations with regard to alcohol and drug testing. Pard turned over the task of dealing with the audit to Rose Marie Martorelli, Respondent’s Human Resource Manager.

During the auditing process, which took several months, Cosi apprised Respondent of several areas that needed attention and provided Respondent with a “sample” drug and alcohol policy for its use. There is no evidence that Cosi ordered Respondent to issue this particular policy. However, Martorelli decided, apparently without Pard’s knowledge, to give this “sample” policy to Respondent’s employees.

Thus, on October 19, Martorelli issued a memo to employees announcing the revised policy and requiring them to sign an acknowledgement of receipt of the revised policy. There is no dispute that neither Martorelli, Pard nor anyone else from Respondent consulted with or notified or bargained with the Union about the issuance of this revised policy.

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<sup>15</sup> As related above, Pard had informed the union committee in a conversation a few days before the contract expired that everything would be “status quo” even after the contract expired as in the past.

<sup>16</sup> The above findings concerning the discussions on this subject are based on compilation of the credited portions of the testimony of Maldonado, Murray and Pard. Their testimony is in most respects not significantly different except that Pard denied that DeCamp said anything, including the comment, “Sign the agreement and you’ll get your uniforms.” I note in this regard that DeCamp was not called as a witness to deny that he made this comment. Therefore, an adverse inference is appropriate that his testimony would not support Pard’s on this issue. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

When Maldonado received his copy of the policy as an employee, he noticed several changes from Respondent's previous policy then in existence. The most prominent issue in Maldonado's view was the new requirements set forth in Section V(D). It reads:

V(D). Right to Inspect

Additionally, separate from any DOT and FTA requirements, under the independent authorization of DeCamp Bus Lines based upon reasonable suspicion that an employee is violating the Zero Tolerance Drug and Alcohol policy, DeCamp Bus Lines has the right to require the employee to submit to a search of clothing, locker, lunch box, bag(s), purse, briefcase, desk, file cabinet(s) and/or vehicle. DeCamp Bus Lines reserves the right to inspect, investigate, and search for drug and/or legal substances such as alcohol at any time, with or without prior notice, on or in any and all DeCamp Bus Lines premises.

Employees will be required to sign a consent form prior to the search, if an employee refuses to sign the consent form and refuses to submit to the search, he/she will be subject to disciplinary action outlined in Section V, I. of this policy.

These provisions were not included in Respondent's prior policy, and Maldonado believed that they were "illegal." After speaking with the Union's attorney, Maldonado spoke with Martorelli about the Union's concerns. Maldonado informed Martorelli that the Union believed that the section quoted above was "illegal" and was a departure from past practice. Martorelli responded that Respondent had received the new policy directly from New Jersey Transit and its auditors and that Respondent had to institute it.

On November 9, the Union filed the instant unfair labor practice charge, alleging in part that Respondent violated Section 8(a)(1) and (5) of the Act by introducing a new drug and alcohol policy without first bargaining with the Union.

In early December, Maldonado spoke directly to Pard about the new policy. Maldonado informed Pard that there were changes in the new policy that the Union viewed as illegal, particularly the provisions permitting searches of clothing and vehicles. Pard informed Maldonado that he thought that the new policy was basically the same as before and that Respondent had received it from New Jersey Transit. Pard also told Maldonado that he would take a look at the policy and review it.

In fact, this was actually the first time that Pard had actually read the new policy. Although he had been aware of the prior issuance of the new policy, he had not read it but relied on Martorelli to issue it.

When Pard read Section V, he agreed with Maldonado that it was inappropriate to search employees personally and their vehicles, and testified that he would never have agreed to it had he seen it and would have fought with the auditor or New Jersey Transit for requiring such searches.

Accordingly, Pard immediately after his conversation with Maldonado informed Martorelli that he was not happy that she issued these revisions and instructed her to get them back from the employees and to issue a corrected policy.

Consequently, on December 9, Martorelli issued a memo to all safety sensitive

employees with a copy to the Union announcing that “We have recently published an incorrect ‘revised’ issued of the above referenced policy.” The employees were asked to return the copy of the policy issued in October and sign for and receive a corrected revised policy dated December 10.

The policy issued on December 10 did not contain the section dealing with searches that the Union had objected to. According to Maldonado, the new policy was “pretty much” the same policy that was in place before the revised policy was issued in October. While Pard testified that the policy revision issued in December was the same as Respondent’s previous policy (prior to the revision in October) except for some minor modifications, Pard did not know what these minor modifications were, and the record does not otherwise establish what differences, if any existed, between the policy issued to employees in December and its policy prior to the October revision.

It is undisputed that the new policy was not enforced between October 19 and December 9.<sup>17</sup>

## IX. Analysis

### 1. Impasse

Section 8(a)(5) of the Act prohibits an employer from unilaterally instituting changes regarding wages, hours and other terms and conditions of employment before reaching a valid impasse in negotiations. *NLRB v. Katz*, 369 U.S. 736 (1962); *Day Automotive Group*, 348 NLRB 1257, 1263 (2006); *Tom Ryan Distributors*, 314 NLRB 600, 604 (1994).

Although an impasse over a single issue does not always create an overall bargaining impasse, it may do so when the single issue “is of such overriding importance” that it creates a complete breakdown in the entire negotiations. *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008); *Richmond Electrical Services*, 348 NLRB 1001, 1002 (2006); *CalMat Co.*, 331 NLRB 1084, 1097 (2000).

If a good faith impasse is found to exist, an employer is free to implement changes that are reasonably comprehended within the employer’s pre-impasse proposals. *Richmond Electrical Services*, supra at 1003; *CalMat*, supra at 1100.

A genuine impasse exists when the parties are warranted in assuming that further bargaining would be futile, *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 840 (2004); *Larsdale Inc.*, 310 NLRB 1317 (1993), when there is no realistic possibility that continuation of discussions at that time would have been fruitful. *Monmouth Care Center*, 354 NLRB #2 ALJD slip op at 47 (2009); *Royal Motor Sales*, 329 NLRB 760, 773 (1999). For an impasse to occur, both parties must believe that they are at the end of their rope, *Monmouth Care Center*, supra; *Area Trade Bindery Co.*, 352 NLRB 172, 176 (2008); *Ford Store San Leandro*, 349 NLRB 116,

<sup>17</sup> My findings with respect to events concerning the changes in the drug and alcohol policy are based on a compilation of the credited portions of the testimony of Maldonado and Pard as well as my review of documentary evidence. The only dispute on the facts is Maldonado’s testimony that he spoke to Pard in October about the issue. Although this discrepancy as with others discussed above is inconsequential to deciding whether unfair labor practices have occurred, I credit Pard on this issue and find that their conversation took place in December, as I have detailed above.

121 (2007); *NLRB v. Powell Electrical Mfg. Co.*, 906 F.2d 1007, 1011-1012 (5<sup>th</sup> Cir. 1990). The existence of an impasse is not lightly inferred and the burden of proving its existence rests on the party asserting it. *Monmouth Care Center*, supra; *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), enf. 86 F.3d 227 (DC Cir. 1996).

The relevant factors considered by the Board in assessing the existence of an impasse include bargaining history, the good faith of the parties in negotiating, the length of the negotiating, the importance of the issue or issues as to which there is disagreement and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enf. *sub nom AFTRA v. NLRB*, 395 F.2d 622 (DC Cir. 1968). Another factor that is considered is the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. *Cotter Co.*, 331 NLRB 787 (2000), rev in part 254 F.3d 1105 (DC Cir. 2001); *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005); *Ead Motors Eastern Air Devices*, 346 NLRB, 1060, 1064 (2006); *Wycoff Steel Co.*, 303 NLRB 517, 523 (1991).

In applying the above principles to the facts here, I conclude that Respondent has fallen far short of meeting its burden of proof that the parties were at impasse when it implemented changes in employee healthcare payments.

I agree with Respondent that the evidence does not establish, and indeed General Counsel does not contend otherwise, that Respondent bargained in bad faith during negotiations. I also agree with Respondent that the issue of healthcare was the most significant issue during bargaining and that the issue was probably the most important reason that employees rejected Respondent's final offer.

Respondent argues that the evidence demonstrates that the parties were at impasse over the critical issue of health insurance contributions, which lead to a breakdown in overall negotiations. Thus, Respondent was privileged to implement portions of its last offer. *Richmond Electrical Services*, supra, 348 NLRB at 1002-1004; *CalMat*, supra, 331 NLRB at 1097. I cannot agree.

I find that the evidence supporting an impasse finding, detailed above, is outweighed by an assessment of the other *Taft* factors. First and foremost is the factor of "contemporaneous understanding of the parties." In order for an impasse to be found, there must be a "contemporaneous understanding of the parties" that an impasse had been reached. *Essex Valley*, supra, 343 NLRB at 841. In that regard, it is well-settled Board law, supported by the Courts, that *both* parties must believe that further proposals could no longer be fruitful or that they are "at the end of their rope" or that *both* parties must be unwilling to compromise. *Monmouth Care Center*, supra, 354 NLRB #2 ALJD slip op at 48; *Laurel Bay Health*, supra, 353 NLRB at 245; *Area Trade Bindery*, supra, 352 NLRB 172, 176; *Day Automotive Group*, 348 NLRB at 1264; *Ford Store San Leandro*, 349 NLRB at 121; *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005); *Essex Valley*, supra, 343 NLRB at 840; *Cotter Co.*, supra, 331 NLRB at 788; *Grinnell Fire Protection*, 328 NLRB 585, 586 (1999), enf. 236 F.3d 187, 199 (4<sup>th</sup> Cir. 2000); *Wycoff Steel Co.*, 303 NLRB 517, 523 (1991); *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (DC Cir. 1991); *NLRB v. Powell Electrical Mfg. Co.*, 906 F.2d 1007, 1011-1012 (5<sup>th</sup> Cir. 1990); *PRC Recording Co.*, 280 NLRB 615, 641 (1986), enf. 836 F.2d 289, 293 (7<sup>th</sup> Cir. 1987); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5<sup>th</sup> Cir. 1982).<sup>18</sup>

<sup>18</sup> I note that despite this well-settled precedent some Board members have expressed some disagreement with the principle that both parties must believe that they were at impasse

Continued

I shall apply extant Board precedent as cited above. However, since I conclude, as detailed below, that *neither* party believed that the bargaining was at impasse, even under the views of Members Schaumber and Hayes, an impasse cannot be found here.

In that regard, I emphasize that at no time during the negotiations, including when Respondent made its “final” offer, did Pard mention that he felt that the parties were at “impasse” or other words to the effect that Respondent believed that the parties were deadlocked or that further bargaining would not be fruitful. Indeed, a few days after Respondent made that alleged “final offer,” the union committee requested additional concessions in order to help sell the offer to the membership, which Respondent agreed upon. Again, at that meeting, Pard made no statements concerning “impasse” or any similar comments.

More significantly, after the membership rejected Respondent’s offer, Pard met again with the Union. While Pard expressed severe disappointment with the union committee for failing to “sell” the contract that Pard believed the committee had agreed to, Pard still made no assertion that the parties were at “impasse” or any other comments that he believed that bargaining had been exhausted or that there was a deadlock or that future bargaining would not be fruitful. Indeed, he did not even say that Respondent would not or could not make any further concessions.

While Pard did decline the request made by Murray to resume bargaining with the committee, he did not say he was doing so because he believed that bargaining was deadlocked or that future bargaining would be futile. Rather, he castigated the Union for not “selling” the contract to the membership and requested that the Union bring in the International before Respondent would agree to any more bargaining. Thus, at the most that Pard was saying in effect was that Respondent believed that future bargaining could be fruitful but only with the International present.<sup>19</sup>

Similarly, when Respondent implemented portions of its offer on October 15, its memo to employees makes no mention of any belief by Respondent that the parties were at impasse or any other assertion with similar meanings. Rather, Respondent stated that it was implementing part of its proposal on health contributions “in lieu of an approved new Collective Bargaining Agreement and due to economic constraints.”

Finally, even at trial during Pard’s extensive testimony, he did not testify that he believed that the parties were at “impasse” at any time or any statements of similar import to the contrary. Pard testified that he decided to implement portions of Respondent’s offer because the Union did not sell the final offer to the membership and the committee had made disparaging remarks about him to the employees. Therefore, Pard did not testify that he believed that the parties were at impasse or that no further bargaining would be fruitful or any similar belief. To the contrary, he testified that he contemplated further bargaining with the Union as exemplified by his response to Murray to bring in the International for further bargaining and his statement in

in order to find that an impasse existed. *Monmouth Care Center*, 354 NLRB #2 fn. 2 (Member Schaumber); *Monmouth Care Center*, 356 NLRB #29 fn. 2 (Member Hayes). I also note that in *Wayneview Care Center*, 352 NLRB 1089 (2008) the two-member Board in footnote 4 found it unnecessary to rely on the judge’s statement, *Id* at 1114, consistent with the precedent cited above that an impasse cannot exist where one party does not view negotiations as having reached impasse.

<sup>19</sup> I note that the International had been included in bargaining for contracts in prior years.



Respondent's memo to employees announcing the implementations that further negotiations with the Union would be continuing with regard to other health contribution issues as well as "a new CBA."

5 In these circumstances, the evidence is overwhelming, and I find that Respondent did not, at the time, believe that the parties were at an impasse or deadlocked or that future negotiations were futile or that it was unwilling to compromise further, or that the parties "were at the end of their rope" or that there is no realistic possibility that continuation of discussions would be fruitful.<sup>20</sup> This finding, in my view, represents a critical defect in Respondent's attempt to meet its burden of establishing the existence of an impasse. *Monmouth Care Center*, supra, 354 NLRB #2 ALJD slip op at 48 (negotiator for employer made no assertions during bargaining or when it submitted final offer that parties were at impasse); *Newcor Bay City Division*, 345 NLRB at 1240 (two of the three representatives of employer did not testify that they believed that parties were at a point where bargaining would be futile or even that employer was at the end of its rope); *Wayneview Care Center*, supra, 352 NLRB at 1114 (employer negotiator never informed union that it believed parties were at impasse although it did present a "final offer"); *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1061 (2006) (final offer submitted by employer incorporated a "transition agreement" calling for further negotiations on several issues, which Board viewed as conceding "that further negotiations...were not only possible, but necessary"); *Essex Valley*, supra, 343 NLRB at 841 (employer negotiator did not assert either at bargaining sessions or in letter implementing changes in working conditions that parties were at impasse).<sup>21</sup>

25 While it is true that Respondent did present a "final offer" to the Union, this is far from sufficient to establish the existence of an impasse or even that Respondent so believed. *Monmouth Care Center*, supra at 48 and 49; *Wayneview Care Center*, supra, 352 NLRB at 1114; *Newcor Bay City*, supra, 345 NLRB at 1225, 1238-1239; *Area Trade Bindery Co.*, 352 NLRB 172, 175, 176 (2008); *Cotter Co.*, supra, 331 NLRB at 787-788 and 791; *Grinnell Fire Protection*, supra at 585 and 236 F.3d 199; *Ead Motors*, supra, 346 NLRB at 1062, 1064; *Tom Ryan Distributors*, 314 NLRB 600, 604 (1994); *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994); *Valley Mould Division, Microdot Inc.*, 288 NLRB 1015, 1016 (1998).

35 Judge Posner's description of final offers is often cited by the Board in assessing the significance of final offers in impasse determination. Judge Posner observed that in collective bargaining the use of "final offer" as a bargaining ploy is common and that in collective bargaining "after final offer come more offers." *Chicago Typographical Union Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7<sup>th</sup> Cir. 1991). Cited approvingly in *Wayneview Care Center*, supra 352 NLRB at 1114; *Tom Ryan Distributors*, supra, 314 NLRB at 605; *Cotter Co.*, supra, 331 NLRB at 791.

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45 <sup>20</sup> Indeed, the evidence establishes, based on Pard's own testimony, that he decided to implement portions of Respondent's offer not because he believed that the parties were at impasse, but because of his anger at the committee for failing to "sell" the contract to the membership and because he was told that committee members made disparaging remarks about him to the employees.

50 <sup>21</sup> I note that in *Essex Valley*, supra the employer negotiator did testify at trial that he believed the parties were at impasse prior to the implementation. The judge rejected this self-serving testimony as unconvincing in view of employer never having made such a contention to the union. Here, of course, as noted, we do not even have testimony from Pard at trial that he believed the parties were at impasse.

The significance of the Respondent's characterization of its offer presented to the Union on September 23 as a "final offer" is further diminished by the fact that it was not Pard's idea to do so. He had only requested that the Union present Respondent's current offer to the membership for ratification. The Union refused to do so unless Respondent called it a "final offer." Thus, in these circumstances, the use of the term "final offer" by Respondent cannot even be construed as even an indication that it believed that no further movement was possible by either sides. Rather, it was done simply to persuade the Union to present Respondent's offer to the membership.

In addition to concluding based on the analysis and precedent cited above that Respondent did not believe that the parties were at impasse, I also find that Respondent has not established that the Union had such a belief either.

The record reveals no evidence that Murray, Maldonado or any other members of the union's negotiating committee made any statements during negotiations, or after Respondent's final offer was rejected by the membership that reflected that the Union believed that the parties were at impasse or deadlocked, or that they believed that further negotiations could not be fruitful or that the parties "were at the end of their rope."

On the contrary, after the Union informed Pard that the membership had rejected Respondent's final offer, Murray told Pard that the main sticking points were the five-year contract and the medical plan and added that if the parties continued to bargain, they could probably "tweak" it a little better and get a contract approved. Pard then castigated the union committee for not selling the contract to the membership. Murray repeated his suggestion that if the parties could sit down maybe they could "do a little tweaking." Similarly, after Pard complained about what he characterized as "5 ½ months down the drain," Maldonado asked Pard if that meant that "We're done with negotiations?" Pard replied 5 ½ months down the drain, call the International. Thus, it is clear that the Union believed that further negotiations could be fruitful and so informed Respondent.

In this regard, Respondent places its principal reliance on Maldonado's admission during cross-examination that he believed that the parties were "at the end of their rope" after the employees rejected Respondent's final offer. However, I place little significance in this purported admission. Respondent's counsel asked the question that after Pard made his comments about five and a half months down the drain and bringing in the International and the lawyers did Maldonado, at that point, believed that "as to the parties' position, you're at the end of your ropes?" Maldonado replied, "Based on the statement, yes." Thus, it is clear that Maldonado's purported admission was based on Pard's statements and not on his (Maldonado's belief) that the parties were at the end of their rope. Indeed, the best that can be said for Maldonado's comment that in view of Pard's comments that perhaps bargaining solely with the committee might not be fruitful, but since Pard asked to bring in the International, further negotiations could be successful.

Further, Maldonado's credibly testified on redirect that when the Union went to Pard's office to notify him of the offer's rejection, he believed that more bargaining could be done towards a new contract, a position expressed by Maldonado as well as by Murray during their meeting with Pard.

Accordingly, I find little significance in Maldonado's purported "admission" and find that it was primarily in response to Pard's comments and did not reflect Maldonado's belief as to the prospects for further negotiations. Indeed, the broad statements made by union negotiators during bargaining that the parties were "at impasse" are not sufficient to establish the existence

of an impasse or that the Union believed that the parties were at impasse in view of the context of the negotiator's statements. *Long Island Day Care*, 303 NLRB 112, 114 (1991) (statement by union negotiator "we seem to be at impasse" held not an admission that the parties had reached impasse, but rather negotiator's way of depicting employer's failure to submit tentative agreement to the board of directors); *Sacramento Union*, 291 NLRB 552, 555-556 (1988) (union negotiator's admission that he expressly agreed during bargaining that the parties were at impasse found to be reaction to employer's decision to prematurely put its final offer on the table).<sup>22</sup>

Further, Board cases are legion that union negotiators' requests to continue bargaining despite the declaration of employer's that the parties were at impasse and/or where a final offer has been made and rejected are a significant indication that the union did not believe that bargaining could no longer be fruitful and that no impasse existed. *Ford Store San Leandro*, supra, 349 NLRB at 116, 121; *Ead Motors*, supra, 346 NLRB at 1064 (union stated its intention to return to bargaining in response to employer's declaration of impasse and employees' rejection of final offer); *Newcor Bay City*, supra, 345 NLRB at 1238 (union asked to continue bargaining when employer asserted that parties were at impasse); *Area Trade Bindery*, supra, 352 NLRB at 176 (union argued that parties not at impasse and stated its willingness to continue bargaining); *Wycoff Steel*, supra, 303 NLRB at 523, 524 (union denied that impasse existed and asserted its willingness and availability to meet with employer to continue negotiations to reach agreement on a new contract); *Cotter Co.*, supra, 331 NLRB at 788 (union negotiators asking employer to meet and negotiate "indicates that the union realistically believed that further negotiations might produce agreement).

I note that these cases represent comments from union negotiators to a declaration by an employer that the parties were at impasse. Here, as detailed above, Respondent made no such declaration, but merely suggested that the International becomes involved in future bargaining.

Accordingly, based on the foregoing, I conclude that Respondent has not established that the Union believed the parties were at impasse, had reached the end of their rope or that the possibilities for agreement had been exhausted.

Having found that Respondent has not shown that "either" party believed that they were at impasse, I need go no further in concluding that no impasse had been demonstrated. However, an examination of the other factors set forth in *Taft* only fortifies that conclusion.

An examination of the parties' bargaining history, another important *Taft* factor, not only does not support Respondent's assertion that impasse was reached, but, in fact, strongly evidences a contrary conclusion. Thus, for the past 13 years, no contract has been reached by the parties prior to the September 12 expiration. Respondent made no changes in terms and conditions of employment, even though prior contracts had expired.

The parties' prior contract, due to expire on September 12, 2006, resulted in three "final offers." The union membership rejected all three of these alleged "final" offers and a mediator was brought in to assist negotiations.

The Union announced a strike date, and shortly before the strike was to commence the

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<sup>22</sup> See also *Ead Motors*, supra, 346 NLRB at 1064 fn. 4 (statement by union negotiator to employee that the parties were at "impasse" insufficient to find existence of impasse).

bargaining committee met with Pard, the parties agreed to make some changes in Respondent's last offer and the parties reached agreement in November 2006. Further, prior negotiations also included International Union representatives and at times counsel for the Union and for Respondent.

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The bargaining history, described above, strongly supports the conclusion, which I make, that the parties had not here exhausted the possibilities of an agreement. The parties had in prior years always bargained past the contract's expiration date, and in their last negotiations, the membership rejected three alleged "final offers" before agreeing on a contract that was

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This year, no strike vote had been taken and a mediator had not been called in to help in the bargaining. *Newcor Bay City*, supra, 345 NLRB at 1239 (parties had not yet availed themselves of a mediator's help, something they had done in the past when they had trouble reaching a contract).

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Respondent has presented no evidence that in prior bargaining the parties had attempted, much less been unable to reach agreement, after a failure to ratify Respondent's final offer. *Ead Motors*, supra, 346 NLRB at 1063-1064. To the contrary, as I have detailed above, the parties finally reached agreement after the membership rejected three alleged "final offers," only corroborating Judge Posner's apt observation, set forth above, that in collective bargaining "after final offers, come more final offers." *Chicago Typographical Union Local 16 v. Chicago Sun Times*, supra, 935 F.2d at 1508, cited in *Wayneview*, supra, 352 NLRB at 1114; *Tom Ryan Distributors*, 314 NLRB at 604.

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Finally, in view of the fact that during these negotiations, Respondent proposed substantial concessions, particularly in healthcare, such proposals warranted more extensive discussions than occurred in these negotiations, which, as detailed above and below, resulted in limited bargaining over healthcare. See *Newcor Bay City*, supra, 345 NLRB at 1239 (substantial concessions sought required more bargaining, and judge finds that "the record provides no reason for believing that the parties could not have concluded an agreement in this instance if the respondent's team had exerted efforts similar to those that produced contracts in the past instead of cutting off negotiations"); *U.S. Testing Co.*, 324 NLRB 854, 860-861 (1997) (substantial concessions sought required more bargaining before impasse could lawfully be declared); *Grinnell Fire Protection*, supra, 328 NLRB at 596 (substantial concessions sought including in health and welfare benefits warranted "more extensive discussions before impasse could be found").

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Another *Taft* factor is the length of negotiations, which is related to an analysis of the state of negotiations, another highly relevant factor is assessing the existence of an impasse. Here, while the parties have bargained on a weekly basis since May, significantly bargaining over healthcare issues was limited by Respondent's failure to obtain precise figures from its carrier as to how high the increase in Respondent's premiums would be. While Respondent did mention at several earlier meetings that it had been informed that the increases would be substantial, it did not make a formal proposal to the Union on healthcare until the August 20 meeting after it had received the figures from the carriers and after it had successfully negotiated with the carrier to reduce the prospective increases.

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Nonetheless, the increases requested by Respondent were still substantial and resulted in intensive bargaining by the parties on this issue during several meetings in September. However, in view of the significant concessions sought by Respondent in this area as well as in the other areas, the length of the bargaining does not support the finding that the possibilities of

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reaching agreement had been exhausted. *Newcor Bay City*, supra, 345 NLRB at 1239 (limited number of meetings discussing healthcare); *Ford Store San Leandro*, supra, 349 NLRB at 121 (while parties met in numerous sessions, it only discussed issue of pension withdrawal in a few meetings before employer declared impasse).

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Further and significantly, the record reveals that both parties made a number of concessions throughout the bargaining on a number of issues, including some agreements on the contentious issue of healthcare. These agreements were reached on a number of significant issues, such as pension benefits, wages, holidays, retention of bargaining unit work, as well as several agreements on healthcare issues.

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In the latter regard, Respondent's September 18 offer called for increases of premiums of 26%, up from the current rate of approximately 22% of salary per employee per month. The Union initially proposed "status quo," i.e. the rates should remain at 22%. That position was rejected. The Union made a counteroffer of 23%, which was again rejected by Respondent. The Union then offered a rate of 24%, which Respondent eventually accepted and included in its final offer submitted to the Union of September 23.

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Similarly, Respondent's proposal of a \$40 co-pay for preferred brands at pharmacies was reduced to \$30 as a result of bargaining with the Union. Respondent's September 18 proposal of a \$80 co-pay for mail order preferred drugs resulted in the Union's initial position of retaining the status quo of a \$30 co-pay. The Union incrementally raised its offer from \$30 to \$60, which was agreed upon by Respondent and included in its final offer.

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While Respondent insisted throughout negotiations that there would be no reimbursements for co-pays as in the past, the Union initially took the position that reimbursements should remain as in the past. The Union subsequently came off this position and made counterproposals to reduce the reimbursements to \$5 or \$10. Respondent continued to reject these proposals, but the evidence does show movement and flexibility on the part of the Union.

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Similarly, the Union made counterproposals to Respondent's demand for increases in generic co-pays and for the introduction of a new category of non-preferred brands with substantial co-pays of \$90 and \$120 for pharmacy and mail order co-pays for such drugs. These counterproposals were rejected by Respondent, but again the Union showed movement and flexibility on these issues.

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The evidence further discloses that on September 25, two days after Respondent submitted its final offer, the committee approached Pard and requested some further adjustments in Respondent's offer in order to show "movement" and enable the committee to have a better chance of selling it to the membership. Respondent agreed to reduce co-pays of various kinds of drugs in amounts ranging from \$5 to \$60. It included agreements to reduce co-pays on all six types of drugs.<sup>23</sup>

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The above evidence demonstrates significant movement and flexibility by both sides, including by Respondent after it made its alleged final offer. Therefore, I find that further movement was possible and that Respondent had failed to demonstrate that the possibilities for further agreement had been exhausted or that further negotiations would be futile. *Coastal*

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<sup>23</sup> The agreement encompassed reductions in co-pays for preferred, non-preferred and generic drugs for mail order and pharmacy purchases.

*Cargo Co.*, 348 NLRB 664 fn. 1 (2006) (respondent demonstrated that further movement was possible by presenting union with multiple final offers after indicating that it had reached a point where it would not bargain further); *Duane Reade Inc.*, 342 NLRB 1016, 1017 (2004) (respondent's final offer represented movement, union made counterproposals and respondent state that it would consider repackaging its final offer; found parties had not yet exhausted the prospects of concluding an agreement); *Day Automotive Group*, supra, 348 NLRB at 1264 (flexibility demonstrated by the union shows that bargaining had not reached a point where further negotiations would have been futile); *Whitesell Corp.*, 352 NLRB 1196, 1197-1198 (2008) (respondent declared impasse even though parties exchanged proposals and reached agreements the day before and day of impasse declaration); *Wayneview Care Center*, supra, 352 NLRB at 1113, 1114 (parties reached agreement on a number of important matters and union had demonstrated flexibility); *Corp. for General Trade (WKJG-TV33)*, 330 NLRB 617 (2000) (parties had not reached impasse in view of the fact that there had been substantial movement prior to implementation of proposals); *AMF Bowling Co.*, 314 NLRB 969, 978 (1994) (both sides made substantial movement; no impasse because respondent "was required to give bargaining process a chance to work"); *Ead Motors*, supra, 346 NLRB at 1064 (both parties were making efforts to narrow the distance between positions during last bargaining session); *Wycoff Steel*, supra, 303 NLRB at 523 (both parties made some movement on various issues; parties had not reached a point in the negotiations at which there was "no realistic possibility that continuation of discussion would have been fruitful).

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has not come close to meeting its burden that the parties were at "impasse" when it implemented portions of its healthcare proposals.

General Counsel urges that Respondent engaged in "bad faith" bargaining by implementing higher co-pays for pharmacy and preferred drugs than in its final offer and higher still than the terms of its revised final offer agreed to with the Union on September 25. I note initially the complaint makes no allegation of bad faith bargaining. Aside from that problem, it is doubtful that such conduct represents bad faith bargaining. *Telescope Casual Furniture*, 326 NLRB 588, 589 (1998) (not unlawful for employer to present alternative proposals to union, which was less favorable than final offer; after final offer rejected, employer implemented the term of less favorable alternative proposal; Board finds no violation,<sup>24</sup> concluding that regressive bargaining is not automatically unlawful and that provisions of alternative proposal had been proposed to the Union and were "reasonably comprehended" in respondent's final offer).

In this regard, it is clear that once an impasse is reached, an employer is free to institute changes in terms and conditions of employment, which are in line with or which are no more favorable than those offered to the union during negotiations preceding the impasse. *Bi-Rite Foods, Inc.*, 147 NLRB 59, 64-65 (1964); *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

Here, there is no question that Respondent implemented changes in healthcare, which were not more favorable to terms offered to the Union. The terms implemented were substantially worse than the terms of its final offer (after modifications), but consistent with previous offers made during negotiations.<sup>25</sup>

There is some Board authority that seems to require that implemented changes after

<sup>24</sup> Member Liebman dissented.

<sup>25</sup> Indeed, Respondent implemented the identical proposal on prescription co-pays that it offered to the Union in its offer of August 20.

impasse must be consistent with an employer's final offer to the union. *Litton Systems*, 300 NLRB 324, 334 (1990) (employer's post-impasse change lawful since it is consistent with its last proposal); *Chas P. Young Houston*, 299 NLRB 958 (1990) (assuming impasse, employer is free to implement only its last offer to union); *Storer Communications*, 294 NLRB 1056, 1090 (1989) (offer must track final offer to union); *Park Inn Home for Adults*, 293 NLRB 1082, 1087 fn.9 (1989) (implemented plan unlawful because it was substantially and significantly different from employer's final offer); *American Gypsum*, 285 NLRB 100, 101 (1987) (once an impasse is reached, "an employer can only make unilateral changes in working conditions consistent with its rejected offer to a union"); *Henry Miller Spring*, 273 NLRB 472, 477 (1984) (if a valid impasse had been reached in the negotiation process, "respondent would have been free to announce and implement its last contract offer"); *Rockland Lake Manor*, 263 NLRB 1062, 1070 fn. 29 (1982) (respondent not free to make any changes, which were not encompassed in or consistent with its last rejected offer); *Crest Beverage*, 231 NLRB 116, 119 (1977) (even supposing impasse, employer can only make changes consistent with its rejected offer to the union); *Royal Himmel Distilling Co.*, 203 NLRB 370 fn. 3 (1973) (it is well-established that an employer can only make changes in working conditions consistent with its rejected offer to an union after bargaining "has reached an impasse").

However, the more recent and more persuasive authority holds that after impasse an employer may lawfully implement any changes that are encompassed by or consistent with any of its pre-impasse proposals made to the Union. *Richmond Electrical Service*, supra, 348 NLRB at 1003 (Act not violated where unilateral changes are reasonably comprehended within an employer's pre-impasse proposals if the employer had bargained to impasse prior to its implementation); *CalMat*, supra, 331 NLRB at 1101 (employer's last offer lawful since it was reasonably comprehended by its bargaining proposals over the course of the negotiations); *Telescope Casual Furniture*, supra at 589 (provisions contained in alternative proposal although harsher than terms of final offer had been proposed or discussed during negotiations and were reasonably comprehended by employer's earlier proposals); *Blue Circle Cement*, 319 NLRB 954, 955 (1995) (employer does not violate the Act by making unilateral changes as long as the changes are reasonably encompassed by its pre-impasse proposals); *Brady-Stannard Motor Co.*, 273 NLRB 1434, 1435 (1985) (implementation lawful since it was consistent with one of employer's alternative offers); *Taft Broadcasting*, supra (employer does not violate the Act by making unilateral changes after impasse if changes were reasonably comprehended in pre-impasse proposals); *NLRB v. Intracoastal Terminal*, 286 F.2d 954, 959 (5<sup>th</sup> Cir. 1961) (despite impasse, unilateral change unlawful since change was not within the area of negotiations during the bargaining sessions).

Indeed, this interpretation of the law is consistent with the Supreme Court decisions in *NLRB v. Katz*, supra at 747 (even after impasse, increase cannot be greater than any if had offered the union at the bargaining table) and *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949) (employer cannot implement changes which are "substantially different from or greater than any which the employer had proposed during its negotiations").

Thus, I am of the opinion that these later Board cases, consistent with *Taft* and *Katz*, represent the correct statement of current law. Thus, under the principles of this precedent, since Respondent here implemented portions of its offer, which were consistent with and in fact identical to its August 20 offer to the Union, the fact that the implemented offer was harsher than its final offer is not indicative of bad faith, I so find, and place no reliance on these facts in finding that Respondent had violated the Act by implementing portions of its offer.

However, as I have detailed above, I have concluded that Respondent has fallen well-short of establishing the existence of an impasse. I reaffirm my finding that it has violated

Section 8(a)(1) and (5) of the Act.

## 2. The Uniform Allowance

It is undisputed that an employer violates its duty to bargain when it institutes changes in employment conditions without notice to and bargaining with the exclusive representatives of its employees. *NLRB v. Katz*, supra. It is also clear that this obligation to notify and bargain with the union continues even upon the expiration of the collective bargaining agreement. The terms and conditions of employment encompassed by the contract, with some exceptions not relevant here, survive the expiration of the contract, and an employer absent impasse violates the Act by changing terms and conditions of employment without notifying and bargaining with the union. *Allied Signal Inc.*, 330 NLRB 1216 (2000); *General Tire & Rubber Co.*, 274 NLRB 591, 592 (1985).

However, the union can waive its right to bargain over changes in conditions of employment established by an expired contract. *Hacienda Resort Hotel*, 351 NLRB 504, 505 (2007); *Henry Cauthorne*, 256 NLRB 721, 722 (1981). Such a waiver will be found only if the employer establishes that the union clearly and unmistakably waives its right to negotiate over the changes. *California Offset Printers*, 349 NLRB 732, 733 (2007); *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983).

To meet the “clear and unmistakable” standard, the contract language must be specific or it must be shown that the matter claimed to have been waived was fully discussed by the parties and the union consciously waived its interest in the matter. *California Offset*, supra at 734; *Allied Signal*, supra at 1238; *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989);

“The clear and unmistakable standard then requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. The standard reflects the Board’s policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.” *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

Therefore, an employer asserting the existence of a waiver bears a high burden of proof that the union had clearly and unequivocally relinquished its right to bargain. *Verizon North Inc.*, 352 NLRB 1022, 1025 (2008); *Allied Signal*, supra at 1228.

Applying these principles to the instant matter, I find that once again that Respondent has fallen well short of meeting its burden of proof.

Respondent concedes, as it must, that the uniform allowance paid by employees had become an established term and condition of employment of its employees, and that it has been for many years. It is included in numerous collective bargaining agreements, including the current agreement, which expired on September 12.

Thus, it is Respondent’s heavy burden to show that the union clearly and unmistakably waived its rights to bargain about Respondent’s decision to unilaterally terminate this benefit on September 13.

Respondent attempts to meet this burden by asserting that the addendum to the contract, signed by the parties in 2007, demonstrated such a waiver. *Hacienda Hotel*, supra; *Henry Cauthorne*, supra. I do not agree.



Respondent asserts that the addendum “quite clearly provides for the automatic termination of their uniform agreement of the CBA.” I find that the addendum provides nothing of the sort.

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The addendum makes reference to Section 8.7 of the agreement, which requires employees to purchase uniforms and reflects that in exchange for permitting Respondent to exercise its right to require employees to purchase uniforms at one supplier selected by Respondent, it will increase the clothing allowance by \$50 from \$275 to \$325. The addendum also contains the following language: “This new amount will become effective for the period from October 2007 through the end of this current Collective Bargaining Agreement at September 12, 2009.” The final sentence in the addendum states that “this addendum can be incorporated into future Collective Bargaining Agreements, but only through future negotiations and based on this two-year period performance.”

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An examination of this language reveals that it says absolutely nothing about Respondent’s obligation to continue paying the uniform allowance in general, which, as noted, has been a long-standing term and condition of employment. Reading the quoted sentences together, it appears that the best that can be said for Respondent’s position is that the parties agreed to terminate the payment of the extra \$50 on the termination of the contract, but even that is not entirely clear. Here, however, Respondent did not merely cease paying the extra \$50, but eliminated the entire benefit.

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Respondent has adduced no evidence that the parties intended that the entire benefit be eliminated on the expiration of the contract. The testimony of Pard concerning the negotiation over the addendum provides no evidence that the issue of whether the entire benefit being eliminated was ever discussed, much less agreed upon. To the contrary, the evidence establishes, consistent with any reasonable interpretation of the addendum, that the parties were discussing only the issue of the extra \$50 payment in exchange for Respondent’s right to require drivers to purchase uniforms at a supplier selected by Respondent. Thus, Respondent has adduced no evidence that the total elimination of the uniform allowance was “consciously explored in bargaining or that the union intentionally relinquished its right to bargain over the topic.” *Provena St. Joseph*, supra, 350 NLRB at 815.

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Finally, since based on Pard’s testimony, it was Respondent, who insisted on the clauses in the addendum pertaining to the alleged duration of the benefit, to the extent that there is ambiguity in the scope of any terms and absent prior practice or extrinsic evidence to illuminate the parties’ intent, I construe that such ambiguity against the drafter — in this case, the Respondent. *California Offset*, supra, 349 NLRB at 735.

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Accordingly, I find that Respondent has not met its burden of establishing that the Union clearly and unmistakably waived its rights to bargain about the elimination of the benefit of providing its employees a uniform allowance, and that it has therefore violated Section 8(a)(1) and (5) of the Act. *Allied Signal*, supra, 330 NLRB at 1216, 1226-1229; *California Offset*, supra, 349 NLRB at 734-736; *Provena St. Joseph*, supra, 350 NLRB at 815; *Verizon North*, supra, 352 NLRB at 1022; *KBMS Inc.*, 278 NLRB 826, 849-850 (1986).; *General Tire*, supra, 274 NLRB at 593.

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The record also establishes an alternative ground for concluding that Respondent violated Section 8(a)(5) of the Act by eliminating the uniform allowance. That is Respondent’s agreement, as expressed by Pard to the Union, to retain the “status quo” while bargaining was continuing, notwithstanding the expiration of the contract. Thus, since the “status quo” clearly

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included the continuation of all benefits, including the uniform allowance, Respondent was obligated to continue such payments, notwithstanding the terms of the addendum. I therefore find this additional ground for concluding that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally terminating the payment of the uniform allowance to its employees.

### 3. The Drug and Alcohol Policy

It is undisputed that policies requiring drug and alcohol testing are mandatory subjects of bargaining, and cannot be changed unilaterally without bargaining with the union. *Uniserv*, 351 NLRB 1361, 1369 (2007); *Intrepid Museum*, 335 NLRB 1 fn. 3, 14 (2001); *Johnson-Bateman*, supra, 295 NLRB at 182-184.

Here, it is undisputed that Respondent had in place an existing drug and alcohol policy, and that it unilaterally made significant and substantial changes to that policy on October 19 by issuing a memo to employees detailing these changes.

Respondent defends its conduct by asserting that the changes were mandated by federal law, and therefore, not unlawful. *Exxon Shipping Co.*, 312 NLRB 566, 567-568 (1993); *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964). However, unlike these cases, Respondent has not established that its actions in changing its policies were mandated or required by federal or state law. Rather, the evidence reveals that Respondent is required by federal regulations to maintain a controlled substance and alcohol use and testing policy that is compliant with federal law. These regulations are enforced by New Jersey Transit, which is the conduit for the federal government in enforcing these regulations.

New Jersey Transit employed Cosi, a contractor to audit Respondent, to determine if its policy was compliant with federal regulations. Respondent detailed Rose Marie Martorelli, its human resource manager, to deal with the audit.

During the audit, which was effectuated over a period of several months, Cosi apprised Martorelli of several areas of its policy that needed attention and provided her a "sample" drug and alcohol policy for Respondent's use. There is no evidence that Cosi ordered or required Respondent to issue the "sample" policy for its employees.<sup>26</sup> However, Martorelli issued the "sample" policy given to her by Cosi as Respondent's new policy. Martorelli did inform Pard that she was issuing a new policy as a result of the audit with Cosi, but Pard did not read it before issuance, relying on Martorelli's judgment as to the terms of the new policy.

After the policy was announced by memo to Respondent's employees, Maldonado noticed several significant changes to the policy from the policy then in existence. He objected to the provisions authorizing searches of employees' clothing, lockers, lunchboxes, bags, purses, briefcases, desks, file cabinets and/or vehicles. Maldonado initially approached Martorelli and expressed the Union's concerns that these changes were "illegal" and a departure from past practice. Martorelli replied that she received the policy directly from New Jersey Transit and its auditors, and that Respondent had to institute it.

After the Union filed a charge about the matter on November 9, Maldonado spoke to Pard in early December about his concerns. Maldonado repeated his view that the changes in the new policy were illegal, particularly the provisions permitting searches of clothing and

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<sup>26</sup> Martorelli did not testify.

vehicles. Pard informed Maldonado that he thought the policy was similar to what it was before and that Respondent had received it from New Jersey Transit. Pard told Maldonado that he would review the policy.

5           After reading the new policy for the first time, Pard agreed with Maldonado that it was inappropriate to search employees personally and their vehicles. Pard testified that he would never had agreed to it had he seen it and that he would have fought with the auditor or New Jersey Transit if they required such searches.

10           Pard then informed Martorelli that he was not happy with the revisions and instructed her to get them back from the employees and issue a corrected policy.

15           Martorelli complied with Pard's instructions and issued a corrected revised policy, which did not include the portions objected to by the Union and was the same as Respondent's prior policy with minor modifications.

20           Thus, based on the above facts, it is clear that neither Cosi nor New Jersey Transit nor the federal government ordered or required Respondent to issue the revised policy. Cosi merely furnished a "sample" policy as a guide to Respondent, and Martorelli decided to institute this "sample" as Respondent's policy.

25           I, therefore, reject Respondent's defense based on *Exxon Shipping*, *Standard Candy* and *Murphy Oil*, which were all cases where employers made changes required by federal law, and therefore, did not violate the Act.

30           Indeed, I note in this connection Pard's testimony that had he read the policy before it was issued, he would not have issued it and would have fought any attempt by Cosi or New Jersey Transit to impose it. Thus, it is clear that Respondent's decision was not mandated by federal law, and made admittedly without notifying or bargaining with the Union, violated Section 8(a)(1) and (5) of the Act. *Uniserv*, supra; *Intrepid Museum*, supra.

35           Respondent also argues that even if a violation of the Act is found by such conduct, it has cured the violations by revoking the policy and reinstituting its prior policy with minor modifications. *Passavant Memorial Hospital*, 237 NLRB 138-139 (1978); *Meadow Valley Constructors*, 331 NLRB 800, 804 (2000); *Claremont Resort*, 344 NLRB 832, 823 (2005); *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 193 (2007); *Kawasaki Motors*, 231 NLRB 1151, 1152 (1977).

40           Respondent concedes, as it must, the Board's requirements for sufficiently repudiating unlawful conduct to relieve an employer of liability are "stringent" as set forth in *Passavant*, supra. They include that to be effective the repudiation must be timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct. Further, there must be adequate publication of the repudiation to the employees involved, there must be no proscribed conduct on the employer's part after the publication and the repudiation or disavowal of coercive conduct should give assurances to employees that in the future the employer will not interfere with the exercise of their Section 7 rights. *Passavant*, supra at 138-139.

50           While Respondent also appears to concede, as it also must, that Respondent did not meet all of the criteria set forth in *Passavant*, it argues that some Board members have expressed the view that all of the criteria set forth in *Passavant* may not be required. *Claremont Resort*, supra, 344 NLRB at 832-833 (majority of panel stated that they are not "passing on all of the aspects of *Passavant*," but find in agreement with the judge that employer's conduct in case

did not cure its unlawful conduct).

Respondent also cites *River's Bend*, supra, 350 NLRB at 193, where the judge affirmed by the Board<sup>27</sup> found that it was not necessary that all the *Passavant* criteria be found in order to cure a violation of the Act, particularly where the violation found is relatively minor, citing *Kawasaki Motors*, supra. (He dismissed the allegation involved on that basis.)

However, the problem with Respondent's position is that here Respondent did not meet any of the criteria set forth in *Passavant* and the violation cannot be construed as in *Kawasaki Motors* and *River's Bend* as minor.

Thus, although Respondent did rescind the unlawful unilateral change, restored the prior policy and so notified the employees, the repudiation was not timely, did not unambiguously admit that it had engaged in unlawful conduct and did not give assurances to employees that in the future that it will not interfere with their Section 7 rights. *Passavant*, supra; *Claremont Resort*, supra.

Thus, the alleged repudiation did not occur until almost two months after the violation, and only after the unfair labor practice charge was filed concerning such conduct. *Passavant*, supra at 139 (repudiation 7 weeks after violation). The repudiation by Respondent did not admit any wrongdoing other than to merely state that the previous policy issued was "incorrect." Further, and most importantly, the statement did not assure employees that it would not interfere with the exercise of employee rights by such coercive conduct. *Passavant*, supra at 139; *Fashion Fair Inc.*, 259 NLRB 1435, 1444 (1966).

Finally, I also note that even after the alleged repudiation Respondent's other violations that I have found, the elimination of the uniform allowance and the unilateral changes in health care payments, had not been remedied. *Passavant*, supra.

I also cannot find, as in *Kawasaki* and *River's Bend*, that this violation can be characterized as minor. The unilateral change involved affected the entire bargaining unit, who were all subject to this unlawfully implemented policy for nearly two months. While the record does not demonstrate that any employee was disciplined as a result of the policy or that any of the new provisions involving searches were ever enforced, this is inconsequential since a violation is required since employees were subject to the policy for some period of time. *Intrepid Museum*, supra, 335 NLRB at 18; *Storer Communications*, 297 NLRB 296, 297 (1989).

I therefore conclude that Respondent has violated the Act by unilaterally changing its drug and alcohol policy, and that it has not adequately repudiated such conduct. Thus, a cease and desist order is appropriate.

In that regard, General Counsel has requested in its brief that I reconsider my ruling issued on the final day of hearing denying its motion to amend the complaint to withdraw its allegation that Respondent had restored its policy in December 2009. I denied said motion because in my view it was too late and that General Counsel adduced no evidence that the "minor modifications" to the old policy that Pard admitted were included in the revised policy issued in December were significant.

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<sup>27</sup> I note though that it is not clear from the decision whether or not the general counsel excepted to this finding. It appears that general counsel did not initially file exceptions, but filed cross-exceptions to respondent's exceptions.

I reaffirm that ruling and deny General Counsel's request for reconsideration. General Counsel's reliance on Respondent's position paper as an excuse for the late amendment is misplaced. General Counsel had in its possession copies of all the policies, including the revisions made by Respondent. Thus, it should have been aware that the December modifications contained some "minor modifications" from the original policy prior to the unlawful implemented policy.

More importantly, I agree with Respondent that in order for a change to unlawful, General Counsel must demonstrate that the change is "material, substantial and significant." *Berkshire Nursing Home*, 345 NLRB 220, 221 (2005); *Civil Service Employees Assn.*, 311 NLRB 6 fn. 2, 7-8.

Here, not only did General Counsel not identify which "minor modifications" of Respondent's prior policy was "significant, material or substantial" when the request to amend the complaint was made, he made no such showing in its request for reconsideration either.

I note further that the Union had made no objection to the policy as revised in December.

In these circumstances, I believed that a cease and desist order is sufficient to remedy this violation, and that General Counsel's request for reconsideration of my decision to deny its motion to amend the complaint is denied.

### Conclusions of Law

1. The Respondent, DeCamp Bus Lines, Inc., is an employer within the meaning of Section 2(2)(6) and (7) of the Act.

2. The Union, Local 1317, Amalgamated Transit Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (5) by unilaterally imposing portions of its final offer concerning reimbursements of co-pays and healthcare payments in the absence of a lawful impasse.

4. The Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally terminating its payment to employees for their uniforms allowance and by changing its substance and alcohol policy.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

### The Remedy

Having found the Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. Respondent shall be directed to restore the terms and conditions of employment that existed prior to its unlawful implementation of its healthcare reimbursements, co-pays and payments and its uniform allowance. The remedy includes rescinding its increases in co-pays and its implementation of a new level of co-pays for non-preferred drugs.

Respondent shall also be ordered to make whole its unit employees for any loss of benefits suffered as a result of Respondent's implementation of new terms and conditions of employment as set forth in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6<sup>th</sup> Cir. 1971) with interest as set forth in *Kentucky River Medical Center*, 356 NLRB #8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>28</sup>

## ORDER

The Respondent, DeCamp Bus Lines, Inc., Montclair, New Jersey, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a). Implementing its last offer to the Union or parts of its last offer before the parties have reached a lawful impasse during negotiations.

(b). Making unilateral changes in its employees' health care reimbursements, co-pays or payments, uniform allowances, its drug and alcohol policy or any other term or condition of employment in the absence of a lawful impasse.

(c). In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

### 2. Take the following affirmative action necessary to effectuate the policies of the Act

(a). On request, bargain in good faith with the Union as the exclusive representative of its employees in the following appropriate unit.

All full-time bus drivers and non-supervisory maintenance employees, excluding superintendents, foremen, dispatchers, receivers, roadmen, starters, office employees and guards and supervisors as defined in the Act.

(b). On request of the Union, restore to its unit employees all terms and conditions that it unlawfully implemented on and after October 15, 2009, including, but not limited to, healthcare reimbursements, healthcare co-pays and uniform allowances, and continue them in effect until the parties reach agreement or a good faith impasse in bargaining.

(c). Make whole the unit employees for any losses suffered by reason of the unlawful unilateral changes plus interest as set forth in the Remedy Section.

(d). Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated

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<sup>28</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e). Within 14 days after service by the Region, post at its Montclair, New Jersey facility, copies of the attached notice, marked "Appendix" <sup>29</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2009.

(f). Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 11, 2011.

\_\_\_\_\_  
Steve Fish,  
Administrative Law Judge

<sup>29</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT implement our last offer to the Union or parts of our last offer before we and the Union have reached a lawful impasse.

WE WILL NOT make unilateral changes in your healthcare co-pays, reimbursements or payments, uniform allowance or our drug and alcohol policy or any other term and condition of your employment without first bargaining with the Union to a lawful impasse.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request bargain in good faith with the Union as the exclusive representative of our employees in the following appropriate unit.

All full-time bus drivers and non-supervisory maintenance employees, excluding superintendents, foremen, dispatchers, receivers, roadmen, starts, office employees and guards and supervisors as defined in the Act.

WE WILL on request of the Union, restore to our unit employees all terms and conditions that we unlawfully implemented on and after October 15, 2009, including, but not limited to, healthcare reimbursements, healthcare co-pays and uniform allowances, and continue them in effect until we reach agreement or a good faith impasse in bargaining with the Union.

WE WILL make you whole for any losses suffered by reason of our unlawful unilateral changes, plus interest.

DeCamp Bus Lines, Inc.

(Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

20 Washington Place, 5th Floor, Newark, New Jersey 07102-3110

973-645-2100, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.